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Supreme Court of the United States

October Term, 1[redacted] 1949

No. 143

BENJAMIN J. WEIL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

No. 144

L. VICTOR WEIL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

Petition for Writs of Certiorari to the United States Court of Appeals for the Second Circuit, and Supporting Brief.

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Supreme Court of the United States

OCTOBER TERM, 1948.

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BENJAMIN J. WEIL,

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COMMISSIONER OF INTERNAL REVENUE.

No. .....

L. VICTOR WEIL,

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vs.

COMMISSIONER OF INTERNAL REVENUE.

Petition for Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Benjamin J. Weil and L. Victor Weil, respectfully pray that writs of certiorari issue to review the orders of the United States Court of Appeals for the Second Circuit entered April 6, 1949, affirming the orders of the Tax Court of the United States.

Opinions Below.

The opinions of the Court below (majority opinion by Judge Swan, dissenting opinion by Judge Learned Hand), are reported in 173 Fed. (2nd) 805, and for convenience are printed in the certified record (Pages 133 to 141). The Tax Court filed an opinion which was reported in 5 T. C. M. 279, and is contained at pages 35 to 45 of the record.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 1141 of the Internal Revenue Code and Section 240 (a) of the Judicial Code, as amended by the Act of Feb. 13, 1925 (28 U. S. C., Section 347). The date of the opinions and orders of the United States Court of Appeals for the Second Circuit sought to be reviewed is April 6, 1949.

Statute and Regulation Involved.

INTERNAL REVENUE CODE:

"Sec. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

"(a) General Rule.—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * * "

Section 19.42-2, REGULATIONS, 103:

"Sec. 19.42-2. INCOME NOT REDUCED TO POSSESSION.—

Income which is credited to the account of or set apart for a taxpayer and which may be

drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. * * * "

Summary Statement.

The petitioners were the executors of the Estate of their father, Jonas Weil, who died in 1917. The estate owned real property and mortgages and also a one-half interest in the firm of Weil & Mayer, a partnership also engaged in the real estate business. The heirs of Jonas Weil were the petitioners and two daughters, each of whom was entitled to an undivided one-fourth interest in the residuary estate. Prior to the taxable years involved in this proceeding, one of the daughters was paid her share in full and the other died leaving children. Thereafter each petitioner owned a one-third interest in the residuary estate and the heirs of the deceased daughter owned the remaining third (Findings R. 36). Shortly after the death of Jonas Weil, petitioners filed individual claims against the estate for indebtedness due to them, and, on May 26, 1927, the Surrogate's Court of New York County adjudicated such claims, granting judgments to Benjamin J. Weil for the sum of $360,986.94 and to L. Victor Weil for the sum of $231,829.96 (R. 36, 37). This indebtedness was liquidated during the ensuing period of

approximately five years, the last and final payment of $868.32 being made to the petitioners on February 26, 1932 (R. 118).

The petitioners as executors filed an account for the period from 1917 to 1928 in the Surrogate's Court, New York County and applied to the court for an allowance of executors' commissions and for interest on the sums which had theretofore been awarded to them. The Surrogate's Court by a decree entered February 11, 1932 made the following awards.

	B. J. Weil	*L. V. Weil*	*Totals*
Executor's Commissions	$61,715.06	$61,715.06	$123,430.12
Interest	48,224.61	9,370.34	57,594.95
	$109,939.67	$71,085.40	$181,025.07

The petitioners in their income tax returns for the year 1932 reported the amounts as set forth above, as having been received by them in that year for executor's commissions and interest (R. 37).

The sums which were actually paid to them during 1932 were $30,064.08 to Benjamin J. Weil and $29,131.68 to L. Victor Weil. The balance was paid to them in various amounts during the following years, with final payments in 1939 of $31,862.67 to Benjamin J. Weil and $11,953.72 to L. Victor Weil (R. 38).

Although the Commissioner had notice that the Jonas Weil Estate did not report the amounts of the Surrogate's awards as having been paid in 1932, the tax returns of the petitioners and of the estate having been duly audited and inspected during the years 1932 to 1938 inclusive, the Commissioner nevertheless took the position that the sums received by the petitioners in 1939 from the Jonas Weil Estate constituted income to them in that year and should have been reported as such. The

deficiencies assessed against them for that year are based on that contention.

On March 23, 1940, the Surrogate's Court entered a decree awarding petitioners commissions for the years 1930 to 1938, inclusive, in the sum of $29,141.38 each. These awards were reported by each petitioner in his 1940 income tax return, and the tax on the whole award was paid therewith on computations made as though the commissions were actually received during the years 1930 to 1938 inclusive under the option granted to the taxpayers by Section 107A of the Internal Revenue Code (R. 39). The sum actually paid to the taxpayers in 1940 on account of the commissions awarded in that year was $5,000. each. In 1941 each of the petitioners received an additional sum of $10,000 on account of the commissions awarded them. It is the Commissioner's contention that the $10,000. received by each of the petitioners in 1941 is income to them in that year and should have been reported as such. The deficiencies assessed against petitioners for the year 1941 are based upon that contention.

Questions Presented.

The basic questions presented are with respect to the right of a taxpayer to assert the constructive receipt of income in resisting an assessment, and the application of that right. As a result of the recent decision of the Court of Appeals for the First Circuit in *Ross* v. *Commissioner,* 169 Fed. (2) 483, there has been a substantial change with respect to the law dealing with this question. The *Ross* case, in reversing the Tax Court, held that the doctrine of constructive receipt is

> "* * * a rule of law, determining what constitutes taxable income and as such presumably binding on all parties" (p. 492).

In the case at bar, both the majority and dissenting opinions agreed that both the taxpayer and the Commissioner may invoke the doctrine of constructive receipt, but, as we shall show, they differed in the application of that principle, the majority failing to apply the same standards of proof that had been applied in cases where the Commissioner was contending that income had been constructively received, particularly with respect to whether there was sufficient cash available to make the payment. The questions presented, therefore, may be summarized as follows:

1. Shall the Statute and Regulation with respect to constructive receipt of income be, not only construed, but *applied* equitably to both the taxpayer and the Commissioner?

2. Shall the determination as to ability to pay the sums alleged to have been constructively received be based upon total assets and net worth or only upon the amount of current cash available to the person making payment?

3. Should the foregoing question be determined as a rule of law, without regard to whether the Commissioner or the taxpayer is asserting the constructive receipt of income?

Reasons Relied on for Allowance of Writ.

(1) Constructive receipt of income is based upon the Regulation quoted above and has generally been held to be a doctrine first conceived by the Treasury in order to prevent a taxpayer from choosing the year in which to report income by electing when he will reduce it to possession. The scope and effect of the doctrine must necessarily be determined by the courts and, until very recently, it was the contention of the Commissioner and the

opinion of the Tax Court that the doctrine was not available for the taxpayers' defense. So the Tax Court in the case at bar indicated when he concluded his opinion by quoting the statement of a colleague to that effect with approval (R. 45).

It was not until the decision of the Court of Appeals for the First Circuit in *Ross* v. *Commissioner*, (*supra*), that the contention of the Commissioner was rejected by a court of higher jurisdiction, and an unqualified ruling made that the doctrine of constructive receipt is available to both the Commissioner and the taxpayer.

The principle thus laid down in the *Ross* case was approved in both the majority and dissenting opinions below, but an examination of those opinions shows very plainly that the question has been settled by the majority only in theory and not in practice.

Judge Hand followed the decision in the *Ross* case to its logical conclusion by holding that the determination as to what constituted constructive receipt of income must depend on the facts and not on whether the Commissioner or the taxpayer was asserting the doctrine, or whether the result arrived at was of benefit to one or the other. He believed that on the facts in this case the petitioners could not have resisted an assessment by the Commissioner. That, he held, was the true test, and therefore, the sums received by them in the years in question constituted income constructively received.

The majority in the court below did not follow the reasoning in the *Ross* case to its logical conclusion and, in our opinion, did not apply the constructive receipt doctrine as a rule of law binding upon both parties. They upheld the Tax Court in drawing every possible inference against petitioners and in imposing upon them a standard of proof which, in fact, nullified and made purely theoretical their right to assert the constructive receipt of income.

The question is not a procedural one but, on the contrary, goes to the very heart of the administration of justice. If, for example, the courts were to substitute for the present requirement that a plaintiff in a civil action need prove his case only by a preponderance of evidence a requirement that he must prove his case beyond a reasonable doubt, the resulting change would be a profound one. Yet, it is not too much to say that the practical effect of the decision of the court below is to create that very situation and, in effect, to hold that the taxpayer must prove his case, not by a preponderance of evidence, but beyond a reasonable doubt.

There is, therefore, presented to this court a question which has not been passed upon by it, but should be, for the purpose of settling the law with respect to constructive receipt of income and the full application of that doctrine in actual practice.

(2) The court below, in basing its conclusion that the sums constructively received by petitioners in the years 1932 and 1940 could not have been paid to them in those years, because there was not sufficient cash available, disregarded the fact that similar contentions advanced by taxpayers in resisting an assessment based on constructive receipt of income have been answered by the courts and the Commissioner with the assertion that the "cash" position alone is not material and that, if sufficient other assets are available, the cash may be borrowed or raised by the sale of some of those assets.

The effect of the decision in the court below, therefore, is to hold that, when the Commissioner asserts the constructive receipt of income, the determination is to be made upon the basis of net worth irrespective of the cash position; while, when the taxpayer asserts the constructive receipt of income, he must show that the actual cash is available. Thus we have two different standards, and a regulation which should be applied equitably to both the

Commissioner and the taxpayer is, in effect, used only for the benefit of the former.

This question has not been, but should be, passed upon by this Court for the purpose of determining whether two different standards are to prevail and, if not, which is correct, so that the law with respect to this branch of the subject of constructive receipt may be finally settled.

WHEREFORE, it is respectfully prayed that Writs of Certiorari issue.

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BRIEF IN SUPPORT OF PETITION.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1) In holding that the Tax Court correctly decided that it was necessary that the sums awarded to the taxpayers by the decrees of the Surrogate's Court be credited to them by ledger or other account entries of the Estate in order to constitute income constructively received.

2) In holding that the Tax Court correctly decided that the sums awarded by the decrees of the Surrogate's Court were not constructively received by petitioners unless there was sufficient cash available in the Estate of Jonas Weil to make payment of the awards in the years in which the decrees were entered, irrespective of the total assets and net worth of the Estate.

3) In failing to apply the Statute and Regulation dealing with constructive receipt of income to the petitioners equitably and in the same manner in which the Statute and Regulation are applied when the Commissioner seeks to charge a taxpayer with constructive receipt of income.

4) In affirming the decision of the Tax Court of the United States.

POINT I.

The Statute and Regulation under consideration should be not only construed but applied equitably, and not exclusively in favor of the Commissioner and against the taxpayer.

The basic question presented here is with respect, not only to the construction of the Statute and Regulation, but also to its *application* in actual practice. At the time

that the case at bar was decided by the Tax Court, he indicated that he did not believe that the principle of constructive receipt should be applied to the taxpayers advantage (R. 45) and his opinion and findings plainly reflect that viewpoint.

That was also the contention of the Commissioner in the case of *Ross* v. *Commissioner*, 169 Fed. (2nd) 483, decided by the Court of Appeals for the First Circuit in July, 1948, with Mr. Justice Frankfurter sitting as a member of the court and writing the opinion.

The Commissioner's contention in that case was rejected and the Circuit Court, in reversing the Tax Court, said:

> "* * * We should suppose that by virtue of the doctrine of constructive receipt, a taxpayer has an affirmative obligation to report any income falling within its scope in his return for the year of such receipt, and that his failure to do so will subject him to such liabilities for interest, penalties, or even criminal prosecutions, as may be appropriate to his case. *If this is so, the doctrine does not merely afford a special choice which the Commissioner may, if he sees fit, exercise retroactively against a taxpayer, but a rule of law, determining what constitutes taxable income, and as such presumably binding on all parties*" (p. 492). (Emphasis supplied.)

In the case at bar, both the majority and dissenting opinions agreed with the decision in the *Ross* case. We may, therefore, assume that the construction of the Statute and Regulation is settled to the extent that constructive receipt may be invoked by both the Commissioner and the taxpayer.

What has not been settled and is squarely presented in this case, however, is the application of that principle. It would be of little avail to the taxpayer to have the right

in theory to plead that income has been constructively received, if, in practice, every possible inference is to be drawn against him and if he is to be subjected to an impossible standard of proof.

We believe that the decision in the *Ross* case and the dissenting opinion in the case at bar held, in effect, that the issue must be determined as a rule of law without regard to whether the Commissioner or the taxpayer is asserting the doctrine of constructive receipt. It is evident that the majority below were influenced by the fact that the taxpayers were availing themselves of the doctrine of constructive receipt to resist an assessment and therefore did not apply the same standards of proof to that situation as they would have applied if the Commissioner had been endeavoring to make an assessment on the same facts.

This may best be illustrated by referring to a conflicting decision made by the Court below, only a few weeks before the decision now sought to be reviewed. In that case the Commissioner was asserting that dividends paid to brokers as registered owners of stock of which a foreign foundation was the beneficial owner had been constructively received in the year in which the commissions were collected by the brokers although not actually received by the foundation in that year. In affirming, the Court said:

> "* * * we agree that petitioner constructively received the dividends, for nothing in the record indicates that there was any 'substantial limitation or restriction' on its right to actual possession of them at any time *it chose really to go after them.*" (Emphasis supplied.)
>
> *Aramo-Stiftung* v. *Commissioner*, 172 Fed. (2nd) 896.

This test as to whether the taxpayer "chose really to go after them" imposes a standard basically different

from that laid down by the same court in the case at bar. In the *Aramo-Stiftung* case we are told that the taxpayer is chargeable with the constructive receipt of the dividends even though it did nothing to obtain them; while in the case at bar we are told that the taxpayers may not avail themselves of the doctrine of constructive receipt because they did nothing to indicate that the moneys had been received by them (aside from declaring it in their individual income tax returns for the years 1932 and 1940).

If the Commissioner had charged the petitioners with the constructive receipt of the commissions, would it have been any answer to say, as the majority in the Court below did, that no ledger entry had been made by the executors when it is undisputed that the estate kept no ledger? Could the petitioners have resisted an assessment by saying as the Court below did:

> "* * * they (the petitioners) did nothing in their official capacity to indicate that the money was immediately available to them in their personal capacity."

If the reasoning of the *Aramo-Stiftung* case is applicable when the taxpayer claims constructive receipt of income, these contentions would have been rejected. Indeed, we think this court has already rejected them, since in the leading case of *Corliss* v. *Bowers*, 281 U. S. 376; 50 S. Ct. 336; 74 L. Ed. 976, it said:

> "* * * taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed."

Even though there may be agreement in principle, we believe that there is disagreement in fact among the Circuit Courts as to the practical application of the doctrine

of constructive receipt and that the two decisions of the court below not only cannot be reconciled with each other, but cannot be reconciled with the decision of the First Circuit in the *Ross* case.

In a footnote to his opinion in that case, Mr. Justice Frankfurter observed that:

> "* * * the doctrine of constructive receipt can be a shield for the taxpayer as well as a sword for the Commissioner" (p. 492).

If that is so, then the weapons of offense and defense supplied by the regulations should be of equal strength; the doctrine of constructive receipt should be applied objectively and should be a rule of law binding upon both the taxpayer and the Commissioner, and the decision should not depend on which of them happens to be asserting the doctrine.

POINT II.

The determination as to whether there were sufficient funds available in the Jonas Weil Estate to make payment of the sums constructively received should depend on the total assets and net worth of the estate and not exclusively on whether there was sufficient cash available.

The second ground on which the court below affirmed the decision of the Tax Court was that there was not sufficient "cash" available in 1932 and 1940 to make payment of the sums awarded in those years by the decrees of the Surrogate's Court. That is a very narrow ground and one which the courts have refused to apply in situations where the Commissioner is contending that income has been constructively received by a taxpayer.

In his opinion, the Tax Court held that:

> "During both 1931 (1932) and 1940 there is no question but that the total assets of the Jonas Weil Estate were amply sufficient to pay the petitioners' claims as was indicated by the court at the time of the hearing" (R. 44).

He nevertheless held:

> "However, the petitioners have not sustained the burden imposed upon them to show that during those two years there was cash available or assets readily convertible into cash to accomplish this purpose" (R. 44).

The court's statement that "the total assets of the Jonas Weil Estate were amply sufficient to pay the petitioners' claims" is fully borne out by the record, which shows that during 1932 (even without considering the Estate's one-half interest in Weil & Mayer) the monthly bank balances ranged from a high of $231,000 in March to a low of $153,000 in December (R. 38), always more than enough to pay the total balance of $121,829.31 due to the petitioners under the decrees of the Surrogate's Court; and that the net worth of the Jonas Weil Estate in 1940 was approximately $209,000 plus its one-half interest in the partnership of Weil & Mayer, which had a net worth in excess of $2,000,000 (R. 39). The balance of $48,000 due to the petitioners for commissions in 1940 came to only approximately 4% of the net worth of the Estate. If the taxpayers had failed to report the commissions awarded to them as constructively received in 1932 and 1940 and if it had been to the interest of the Commissioner to charge them with the constructive receipt in those years, he could readily have said that they could have obtained the moneys if they "chose really to

go after them". But here it is the taxpayers who assert constructive receipt, and they are, therefore, met with the contention that they must show, not merely that there were sufficient assets, but that there was sufficient cash available.

This emphasis on cash, however, is directly contrary to the position which the Commissioner takes when he is attempting to charge the taxpayer with constructive receipt. This may be illustrated by a few typical cases:

In the case of *A. D. Saenger Inc.* v. *Commissioner*, 84 Fed. (2) 23, the Court of Appeals for the Fifth Circuit said:

> "That A. & J. Inc. did not carry cash on hand sufficient to pay what it had unreservedly put to the credit of A. D. Saenger, Inc., is unimportant. *It could on demand have borrowed it or raised it by sale of some of its investments.*" (Emphasis supplied.)

In another case the court said:

> "The fact that at times the petitioner lacked a little of having cash on hand to pay Schlosser in full is not controlling. *Jacobus* v. *United States, supra; Celina Manufacturing Co.* v. *Commissioner*, 142 Fed. (2) 449. *Petitioners at any time could have borrowed ample funds* with which to pay the commissions due and credited to him on its books." (Emphasis supplied.)
>
> *Lectrolite Corp.* v. *Commissioner*, 4 Tax Ct. Mem. Dec. 437.

In these cases we have the courts suggesting that the taxpayers could have *borrowed* the moneys and yet in the case at bar the courts below took the position that the funds were not available although, in addition to the sub-

stantial bank balances, the investments of the estate were in the form of real estate and conservative mortgages, readily convertible to cash (R. 110).

And in the *Jacobus* case, the Court of Claims said:

> "The cash in bank is only a part of the assets of a corporation. Many other items enter into its capital and surplus."
>
> *Jacobus* v. *U. S.*, 9 Fed. Supp. 41, 45.

We think these cases indicate that, if the decision of the majority in the court below is correct, we are to have two different standards applicable in the decision of constructive receipt cases, depending on whether the taxpayer or the Commissioner is asserting the doctrine. If that is so, then the decision in the *Ross* case becomes an empty victory for the taxpayer, because in practice he will have no real chance of sustaining the burden which has been placed upon him.

Conclusion.

The court below held that the Tax Court was correct in imposing the most technical requirements upon the taxpayers. It drew a very sharp distinction in the position of the taxpayers as executors and as partners in Weil and Mayer, between the moneys held by the Jonas Weil Estate and the very substantial assets of the Weil & Mayer partnership in which the estate had a one-half interest; and it drew that distinction despite the *undisputed fact* that either one of the petitioners had the right to draw checks on the partnership alone and they were in full control of the partnership assets (R. 86). Since the

taxpayers had "actual command over the property taxed" it would seem that the court below was "concerned with the refinements of title" and, therefore, not in accord with the decision of this court in *Corliss* v. *Bowers* (*supra*).

The issue in this case may best be summed up in the conclusion to the dissenting opinion of Judge Hand in which he stated:

> "* * * there must be an end to imaginary obstacles thrown in the path of a taxpayer under the guise of compelling him to prove his case."

In the case at bar, the only witness at the trial was L. Victor Weil, one of the petitioners. There was no actual issue of fact, but the Tax Court and the majority in the court below in interpreting the facts, created a chain of "imaginary obstacles" *which in practice* make it impossible for any taxpayer to prevail.

This case, therefore, presents in concrete form the entire issue with respect to the standards of proof, the presumptions and inferences to be drawn in constructive receipt cases and the application of the Regulation in actual practice. In view of the conflict of opinion evidenced by the decisions, we respectfully urge that the questions presented should be reviewed by this court.

Accordingly, it is urged that writs of certiorari should issue.

Respectfully submitted,

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Supreme Court of the United States

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No. 143.

BENJAMIN J. WEIL, *Petitioner,*

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COMMISSIONER OF INTERNAL REVENUE.

No. 144.

L. VICTOR WEIL, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE.

REPLY BRIEF FOR PETITIONERS.

I.

(A) At page 11 of Respondent's brief, reference is made to the fact that a one-third interest in the Jonas Weil Estate was owned by children of a sister of the petitioners, and the inference is attempted to be drawn therefrom that petitioners were not free to make payment of the sums due to them. If any inference is to be drawn, it must be to the contrary. As Judge Hand pointed out in his dissenting opinion, when the accounting decree was

made "it must have appeared that there were assets enough to pay all claims in full" (R. 140). Moreover, it is not disputed that the decrees were made by the Surrogate's Court on notice to all the parties, including the infants represented by Special Guardians, and the decrees fixed and settled the interests of all the parties.

(B) The Tax Court found (R. 38), and Respondent concedes (Brief, p. 7) that the total amount paid each executor did not include any interest on such income from 1932 when the first award was made by the Surrogate's Court. The Respondent, apparently, has missed the significance of petitioners' failure to charge or receive any interest on the constructively received income. Although moneys were drawn by the petitioners each year (beginning with 1932) on account of that income, no interest was claimed by them on the balances. If interest had been claimed, that would have indicated that the moneys had not been appropriated to the petitioners in 1932 and 1940, respectively, and that they were merely general creditors. That the petitioners did not charge the Estate any interest is the strongest possible indication that they regarded the funds at all times as theirs and as immediately available to them and, therefore, not subject to the payment of interest.

II.

We think that some comment should be made on the footnote in Respondent's brief (p. 12) to the effect that the dissenting opinion explicitly refrained from passing upon the finding of the Tax Court that sufficient cash was not available to make the payments in the years of claimed constructive receipt. We doubt the correctness of that statement but, in any event, we think that the following quotation from Judge Hand's opinion indicates his views on the subject more accurately:

"The Tax Court's refusal to accept the testimony as conclusive against these possibilities seems to me to stretch its prerogative very nearly to the breaking point; but, as my views are not in any case to prevail, I do not feel myself charged with the duty of deciding whether that refusal was 'clearly erroneous'" (R. 140, 141).

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 143

BENJAMIN J. WEIL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 144

L. VICTOR WEIL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 35–45) is unreported. The opinion of the Court of Appeals (R. 133–141) is reported in 173 F. 2d 805.

JURISDICTION

The judgments of the Court of Appeals were entered on April 6, 1949 (R. 141–142). The peti-

tion for writs of certiorari was filed on June 27, 1949. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Whether the court below was correct in ruling that, on the record facts in this case, the Tax Court properly concluded that amounts on account of executor's commissions and interest constituted taxable income to taxpayers in 1939 and 1941, when actually received by them, and that these amounts may not be regarded as having been constructively received in the respective prior years, 1932 and 1940, when they were awarded by the Surrogate's Court and when they were included in taxpayers' income tax returns.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 42 [As amended by Sec. 114, Revenue Act of 1941, c. 412, 55 Stat. 687]. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.
>
> (a) *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.
>
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>
> (26 U. S. C. 1946 ed., Sec. 42.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

> SEC. 19.42–1 [As amended by T. D. 5086, 1941–2 Cum. Bull. 38, and T. D. 5233, 1943 Cum. Bull. 198]. *When included in gross income.*—
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> (a) *In General.*—Except as otherwise provided in section 42, gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. * * *
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> SEC. 19.42–2. *Income not reduced to possession.*—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date,

the mere crediting on the books of the corporation does not constitute receipt.

STATEMENT

The Tax Court made the following findings:

Jonas Weil, father of taxpayers, died in 1917. At the time of his death he was engaged in the real estate business in his own name and was a member of the real estate firm of Weil & Mayer, a partnership, in which he owned a one-half interest. From 1925 to April, 1945, the date of the hearing in the instant proceedings, taxpayers were the joint executors of his estate. Its chief assets were real estate, mortgages, and an interest in the real estate and mortgages owned by Weil & Mayer. The heirs of Jonas Weil consisted of two sons, the taxpayers, and two daughters. Under his will each heir was given an undivided one-fourth interest in his residuary estate. At some time prior to the taxable years, one of the daughters was paid her share in full, and the other daughter died, leaving seven children. Thereafter, taxpayers each owned one-third interest in the residuary estate and the heirs of the deceased daughter owned the remaining one-third interest (R. 36).

After their father's death, taxpayers filed claims against his estate on the ground that by contract he had granted them a share of his earnings from Weil & Mayer in consideration of their services rendered to him. On May 26, 1927, in satisfaction of their claims, the Surrogate's Court,

New York County, allowed taxpayer Benjamin Weil $360,086.94 and taxpayer L. Victor Weil $231,829.96 (R. 36–37).

Taxpayers, as executors, filed an account from 1917 to 1928, and applied to the state court for allowance of executor's commissions and also for interest on the sums which had already been decreed to them by reason of their claims against the estate. The Surrogate's Court, on February 11, 1932, made the following awards (R. 37):

	Benjamin J. Weil	L. Victor Weil	Total
Executor's commissions	$61,715.06	$61,715.06	$123,430.12
Interest	48,224.61	9,370.34	57,594.95
Total	109,939.67	71,085.40	181,025.07

Taxpayers reported these amounts ($109,939.67 and $71,085.40) on their respective 1932 returns but by reason of large sums claimed as losses on worthless stock they showed no tax as due (R. 37).

On the other hand, the 1932 income tax return of Jonas Weil Estate did not show the payment of this interest and commissions or claim any deductions on that account. The estate return for 1932 reflected a loss of $91,265.47. Had the payment of interest and commissions been included, the estate loss for 1932 would have exceeded $272,000 (R. 37).

On January 1, 1930, the estate had assets of all categories, excluding partnership interest in Weil & Mayer, totaling $331,124.59. In January 1932, the estate was in approximately the same condi-

tion (R. 37–38). During 1932, the monthly bank balances as shown on the first day of each month ranged from a high of $231,000 in March to a low of $153,000 in December. The Tax Court explicitly found that the record does not disclose the extent of the liabilities either by stipulation or evidence and is not clear as to the amount or manner of payment of the current operating expenses of the estate. Therefore the Tax Court expressly did (R. 38)—

> not find that during 1932 there were sufficient cash assets available in the Jonas Weil Estate to pay the claims of the petitioners for their executor's compensation and interest, while at the same time paying the operating expenses and keeping a sufficient reserve to meet outstanding liabilities.

From 1932 to 1941, the annual operating expenses were substantially the same each year. In 1933, they were $65,000 and in 1934, $69,000 (R. 38).

From 1932 to 1939, taxpayers, as executors, paid themselves on their awards for compensation and interest the following amounts (R. 38):

	Benjamin J. Weil	L. Victor Weil
During 1932	$30,064.08	$29,131.68
During 1933	20,000.00	22,500.00
During 1934	13,000.00	5,000.00
During 1935	345.63	None
During 1936	822.36	None
During 1937	2,834.06	2,500.00
During 1938	11,010.87	None
During 1939	31,862.67	11,953.72
Total	109,939.67	71,085.40

These amounts were treated as deductions for the years when paid in the estate income tax return. The total amount paid each executor did not include any interest for such payment from 1932 to the year in which payment was made (R. 38).

On March 23, 1940, the Surrogate's Court awarded taxpayers as fees and commissions for the years 1930 to 1938, inclusive, $29,141.38 each, or a total of $58,282.76. Each taxpayer returned the entire award in his 1940 return but the tax on the award was paid in that year as though the amounts were actually received during the years 1930 to 1938, inclusive, under the provisions of Section 107 (a) of the Internal Revenue Code (R. 39).

In 1940, the net worth of the Jonas Weil Estate was approximately $209,000 plus its interest in the Weil & Mayer partnership. The monthly bank balance on the first of each month of the estate ran from $6,000 in January to $34,000 in November. The monthly bank balance of the firm of Weil & Mayer, in which, as aforesaid, the estate owned a one-half interest, ranged from $580 in December to $16,000 in September, 1940. The combined total bank balance on the first day of each month of 1940 of the estate plus the one-half interest in the bank balance of Weil & Mayer ranged from a high of $49,000 in November to a low of $19,000 in January. The current operating expense for the estate in 1940 was $41,209.94.

The net worth of Weil & Mayer was in excess of $2,000,000. In the absence of evidence as to the outstanding indebtedness or the manner of paying the operating expenses, the Tax Court explicitly did (R. 39)—

> not find that during the year 1940 the Jonas Weil Estate could have paid these petitioners their award of $58,282.76 from available cash.

The actual payments on these awards up to July 29, 1942, were as follows (R. 39):

	Benjamin J. Weil	L. Victor Weil
1940	$5,000	$5,000
1941	10,000	10,000
1942 (to July 29)	2,500	2,500

The Jonas Weil Estate claimed these payments as deductions on its income tax return as they were made (R. 40).

Both taxpayers and the estate were on the cash receipts and disbursements basis. The estate did not set up the awards of the Surrogate's Court in favor of taxpayers as accounts payable and the amounts of these awards were not credited to taxpayers on the estate's books in the years they were made, and no funds were segregated or set aside for them (R. 40.)

The Tax Court further found that during both 1931 and 1940 there is no question but that the total assets of the Jonas Weil Estate were amply sufficient to pay taxpayers' claims but that tax-

payers did not sustain the burden imposed upon them to show that during those two years there was cash available or assets convertible into cash to accomplish payment of these claims (R. 44).

The Commissioner determined that the following amounts received by taxpayers from the estate in 1939 and 1941 constituted taxable income to them in those years (R. 40):

	Benjamin J. Weil	L. Victor Weil
1939	[1] $31,826.67	$11,953.72
1941	10,000.00	10,000.00

[1] The Tax Court notes that it appears from the evidence that this amount should have been $31,862.67 (R. 40).

The Tax Court sustained the Commissioner's determinations (R. 40–45, 46–47); upon taxpayers' appeal, the court below affirmed the Tax Court (R. 133–139). Judge Learned Hand dissented (R. 139–141).

ARGUMENT

1. There is no conflict in principle, as taxpayers concede (Pet. 11), between the decision below and that of the Court of Appeals for the First Circuit in *Ross* v. *Commissioner,* 169 F. 2d 483 (R. 135); nor is there, contrary to taxpayers' contention (Pet. 12–14), any conflict in application of principle. Again, contrary to taxpayers' contention (Pet. 12–13), the recent holding of the court below in *Aramo-Stiftung* v. *Commissioner,* 172 F. 2d 896 (C. A. 2d), is consistent with its decision here; the cases are readily distinguishable on their facts.

In short, this case turns on its own facts and raises no question of warranting the intervention of this Court.

In the last analysis, taxpayers' contention here is that the mere award by a state court in an accounting decree of commissions and interest in favor of the accounting executors against an estate constitutes, in and of itself, and without more, the receipt of income on the cash basis by the executors individually in whose favor the award is made. Although the controlling Treasury Regulations 103, Section 19.42–2, *supra,* have been in effect substantially since 1918 (R. 134), and state courts have awarded commissions to a multitude of executors in the thirty years that have intervened, nevertheless, no precedent supports taxpayers' contention. Such decrees represent no more than judicial determinations of liability, and cannot be conclusively regarded as equivalent to actual cash payment. Assuming, arguendo, as did the court below, that in the case of an estate whose books show only receipts and disbursements, such accounting decrees may be considered as a "credit" of income within the meaning of the governing Regulations, *supra,* p. 3, nevertheless, they surely do not constitute, as the court below correctly held (R. 136–137), compliance with the further provisions of the Regulations, *supra,* p. 3, that:

> To constitute receipt in such a case the income must be credited or set apart to the

> taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition.

Thus, here, one-third of the estate was owned by seven children of a deceased sister and taxpayers had been engaged in litigation adverse to that branch of the family (R. 36–37). In exercising their discretion as to the time of payments to themselves, taxpayers as fiduciaries were required to consider the interests of the estate; in their individual capacities they did not unrestrictedly control the money until they had objectively indicated the exercise of discretion in favor of immediate payment to their personal accounts. Not only did they do nothing to indicate that the money was immediately available to them in their personal capacity (R. 137), but in contradiction of their present assertion that the entire amounts were constructively received in the years of the decrees, they caused the estate to claim deductions for payments to them in its income tax returns for the years 1932 to 1942 only as and when cash payments actually were made (R. 37–38, 40, 137).

2. The court below did not err in refusing to reverse, as clearly erroneous, the fact findings of the Tax Court that sufficient cash was not shown

to have been available to make the payments in the years of claimed constructive receipt (R. 38–39, 44–45, 138–139).[1] The opinions of the court below and of the Tax Court, with sufficient detail for present purposes, set forth the substantial basis in the record for the assailed findings of fact. Whether income has been constructively received is a question the answer to which depends upon an appraisal of all the circumstances. Contrary to taxpayer's contention (Pet. 14–17), there is no rule of law that a constructive receipt follows because, despite a lack of cash on hand, funds might have been obtained through borrowing or selling assets. Indeed, there are decisions to the effect that a possibility of borrowing or selling assets is not enough when funds are not actually so secured. *Adler* v. *Commissioner,* 77 F. 2d 733, 734 (C. A. 5th); *Lawrence* v. *Commissioner,* 143 F. 2d 456 (C. A. 9th); *Northern Trust Co.* v. *Commissioner,* 8 B. T. A. 685, 687; *Chandler* v. *Commissioner,* 16 B. T. A. 1248. And, on this record, it was entirely uncertain whether attempts at so obtaining cash would have been successful (R. 44). What is most significant in this case, however, as the court below noted (R. 137, 139), is that the executors would have been required to exercise their discretion before borrowing or selling, a step which they never took.

[1] The dissenting opinion explicitly refrained from passing upon this question (R. 141).

CONCLUSION

The decision of the court below is correct and no question warranting review is presented. The petition for writs of certiorari should be denied.

Respectfully submitted.

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